

PUBLIC PROSECUTOR

v.

HASHIM BIN HUSSEIN & ANOR.

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CRIMINAL APPEAL NO. 41-168-93]
13 AUGUST 1994

CRIMINAL LAW: Corruption - Respondents acquitted and discharged after close of defence case - Magistrate finding that first respondent had succeeded in rebutting the presumption under s. 14 of the Prevention of Corruption Act 1961 that the money found in his possession was corrupt money - Magistrate finding that second respondent succeeded in raising reasonable doubt against prosecution case - Whether Magistrate's findings were against the weight of evidence.

The respondents were charged for an offence under the Prevention of Corruption Act 1961 (the Act), the first respondent under s. 4(a) thereof and the second respondent under s. 3(a)(ii) thereof. At the conclusion of the trial, the learned Magistrate acquitted and discharged both the respondents. The prosecution appealed against the acquittals contending that the findings of the learned Magistrate were against the weight of evidence.

Held:

[1] The first respondent's story was incredulous. It was a made up story devoid of any substance. It was clear from the notes of evidence that the first respondent's story crumbled under cross-examination. His evasive, incredulous and contradictory answers to the questions put to him by the prosecuting officer only went to show that he was a witness who was unworthy of credit.

[2] Had the learned Magistrate scrutinised carefully the first respondent's evidence, particularly during cross-examination, he would not have accepted the first respondent's evidence as reasonable and probable. In the circumstances, the learned Magistrate erred in law and in fact when he concluded that on the evidence and on a balance of probability the first respondent had succeeded in rebutting the presumption under s. 14 of the Act.

[3] The learned Magistrate was right in holding that the presumption under s. 14 of the Act was not applicable to the second respondent. However, on a scrutiny of the evidence of the second respondent, particularly his answers to the questions put to him by the prosecuting officer, the findings of the learned Magistrate that the evidence of the second respondent had succeeded in raising a reasonable doubt was clearly against the weight of evidence.

[Appeal allowed. Magistrate's decision reversed. Respondents found guilty, convicted and sentenced].

Legislation referred to:

Prevention of Corruption Act 1961, ss. 3(a)(ii), 4(a), 14.

For the appellant - Ahmad Bachee, DPP

For the respondents - Kartar Singh; M/s. Kartar Singh Dhaliwal & Co.

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC:

This is an appeal by the public prosecutor against the acquittal of the first and second respondents by the Magistrate's Court Alor Setar. In the Magistrate's Court, the charges against them were:

(a) Against the first respondent:

That you on 6 March 1985 at about 4.50 p.m. at number 540-541, Felda Sungai Tiang Pendang, in the District of Pendang at 14/10, in the State of Kedah, being an agent of the Government of Malaysia,

- a** to wit, Police Constable 84137 of the Police Di Raja Malaysia attached to Balai Polis Sungai Tiang did corruptly accept from one Ahzahar bin Ahmad for yourself, a gratification, to wit, cash of 30 ringgit as inducement for forbearing to do an act in relation to your principal's affairs, to wit, to refrain from taking action against the said Ahzahar bin Ahmad for committing an offence of not wearing a crash helmet while riding a motorcycle and that you have thereby committed an offence punishable under s. 4(a) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57).
- b** (b) Against the second respondent:
- That you on 6 March 1985 at about 6.05 p.m. at the Balai Polis Sungai Tiang, Pendang, in the District of Pendang at 14/10, in the State of Kedah did corruptly solicit from one Ahzahar bin Ahmad for Police Constable 84137 Hashim bin Hussein attached to Balai Polis Sungai Tiang, a gratification, to wit, a sum of 30 ringgit as an inducement to the said police constable for refraining to take action against the said Ahzahar bin Ahmad for committing an offence of not wearing a crash helmet while riding a motorcycle and that you have thereby committed an offence punishable under s. 3(a) (ii) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act, No. 57).
- c** The evidence adduced by the prosecution witnesses were as follows. On 6 March 1985, one Ahzahar (SP8) and one Zakaria (SP7) were riding a motorcycle (with SP7 as the pillion rider). SP8 was travelling from the town of Sungai Tiang and was on his way home. On the way, they were stopped by the first and second respondent. The first respondent asked for SP8's driving licence but the latter did not have one. Neither SP8 nor SP7 were wearing a helmet at that time.
- d** Both SP8 and SP7 were taken to the Sungai Tiang police station by the first and second respondent. At the police station, SP8 was taken to a room while SP7 was asked to wait near the enquiry counter. In the room, SP8 was asked by the first respondent as to whether he was involved in the theft of a motorcycle. The first respondent pressured SP8 by saying that if he were to admit to the theft of the motorcycle, no action would be taken against him for the traffic offences, but SP8 denied being involved with the theft of the motorcycle. After thirty minutes, the first respondent left the room and the second respondent entered the room. The latter asked
- e** SP8 whether he would like to "settle the matter" ("untuk selesaikan") but SP8 responded by saying that the second respondent may "summons" him if he so wished ("Saya kata hendak saman, samanlah"). Then the second respondent told SP8 that the first respondent asked thirty ringgit to settle the matter. SP8 replied that he would give the money the following day. Thereafter, the first respondent entered the room and asked SP8 to leave by the back door.
- On the following day (7 March 1985) at about 10 a.m., SP8 happened to meet the first respondent at Sungai Tiang town. The first respondent asked for the money but SP8 replied that he did not have any. On 13 March 1985 at about 4.30 p.m., while travelling on his motorcycle with one Subri (SP6) to the house of a friend by the name of Hamid, he was stopped by the first respondent who again asked him about the money. SP8 replied that he did not have any, whereupon the first respondent said, "Kamu bohong saya." and went off. On 15 March 1985, SP8 happened to meet Hamid who told him that the first respondent was looking for him (Hamid) and that he wanted to lodge a report with the Anti Corruption Agency (ACA) in Alor Setar. Upon hearing that, SP8
- f** also decided to report the first respondent to the ACA. So he went to the ACA office at Alor Setar where he met an officer of the ACA by the name of Encik Ishak bin Abdullah (SP10) who asked him to go to Sungai Tiang the following day (16 March 1985). The next day (16 March 1985), SP8 went to Sungai Tiang town and there, as arranged, he met SP10 and two other ACA officers, namely, Encik Zainal bin Hj. Adam (SP11) and Encik Mokhtar bin Sani (SP12) at a school. At that meeting, SP8 was given three ten dollar notes by Encik Ishak with a view to trap the first respondent. Later in the day, and as instructed, SP8 went to Sungai Tiang town and he again
- g** met the first respondent who asked him, "Ada duit?" and SP8 replied in the affirmative. SP8 then brought the first respondent to a coffee shop where the three ACA had positioned themselves, waiting to arrest the first respondent at the appropriate moment. In the coffee shop both SP8 and the first respondent had a drink. After the drink, the first respondent asked for the money and SP8 took out the money from his pocket and gave it to the first respondent. When the first respondent was about to approach the counter, SP11 arrested him. On the same day,
- h** but at night, the second respondent too was arrested.
- i**

At the close of the case for the prosecution, the learned Magistrate acquitted and discharged both the respondents on the ground that the prosecution had failed to establish a *prima facie* case. On appeal by the Public Prosecutor against the acquittals, the High Court allowed the appeal, set aside the order of the learned Magistrate and ordered the respondents to enter their defence. However, the learned Magistrate, after hearing the defence evidence, acquitted both the accused on the ground that, in respect of the first respondent, he had on a balance of probability succeeded in rebutting the presumption (under s. 14 of the Prevention of Corruption Act 1961 (Act 57)) that the money found in his possession was corrupt money; and in respect of the second respondent, on the ground that he had succeeded in raising a reasonable doubt against the prosecution's case. The public prosecutor now appeals against the acquittals.

One of the grounds of appeal is that the findings of the learned Magistrate were against the weight of evidence.

After considering the whole evidence and the submissions, I accept the submission of the learned Deputy Public Prosecutor that the findings of the learned Magistrate were against the weight of evidence. To my mind, there is no substance at all in the defence of both respondents.

I shall first deal with the defence of the first respondent. As the money was found in his possession, he had to rebut the presumption under s. 14 of the Prevention of Corruption Act 1961 (Act 57). He had to rebut it on a balance of probability. In attempting to rebut the presumption, the first respondent gave evidence that it was all a frame-up by Ahzahar (SP8); that he had never solicited the money from SP8, that on 6 March 1985, at about 5.30 p.m., he and the second respondent were travelling on a motorcycle on their way to carry out peacekeeping duty (jaga aman) at a football match; that on the way they met SP8 and SP7 riding a motorcycle (with the latter riding pillion); that he arrested SP8 together with SP7 solely for the purpose of getting information from SP8 regarding the theft of a motorcycle; that on 16 March 1985 he went to Pekan Sungai Tiang to buy flower pots; that he never made any arrangement with SP8 to meet the latter at the coffee shop; that it was SP8 who invited him to the coffee shop where they had a drink; and that the trap money was thrust into the palm of his hand by SP8 while he was shaking hands with the latter in the coffee shop.

In my view, the learned Magistrate, with respect, erred in law and in fact when he concluded that on the evidence and on a balance of probability the first respondent had succeeded in rebutting the presumption. To my mind, the first respondent's story was incredulous. It was all a made-up story devoid of any substance. It is therefore hardly surprising that, from the notes of evidence, the respondent's story crumbled under cross-examination. His evasive, incredulous and contradictory answers to the questions put to him by the prosecuting officer only went to show that he was a witness who was unworthy of credit. Had the learned Magistrate scrutinised carefully the first respondent's evidence, particularly during cross-examination, he would not have accepted the respondent's evidence as reasonable and probable. My view is based on the following reasons.

First, in his evidence during examination-in-chief, the first respondent alleged that SP8 was a local criminal and gave the impression that he had knowledge of SP8's alleged criminal activities. He said:

Masa itu mereka atas motosikal. Saya dan OKT 2 juga atas motosikal. Saya suruh Ahzahar berhenti motosikal yang dipandunya. Saya tanya kepada Ahzahar berkenaan dengan maklumat motor curi. Bila saya arah Ahzahar turun daripada motosikal, saya tanya Ahzahar tentang motor curi sebab saya syaki kehilangan motosikal yang baru berlaku di Sg. Tiang adalah bersangkutan dengannya. Saya memang mengenali Ahzahar. Ini kerana Ahzahar dalam kawasan jagaan saya. Ahzahar banyak lakukan jenayah seperti curi motor, enjin, pecah rumah dan lain-lain jenayah.

These were, no doubt, serious allegations. Yet, when cross-examined, he was not able to substantiate any of these serious allegations. Indeed, when questioned by the prosecuting

a officer, he appeared not to have any personal knowledge at all of any of the matters that he had alleged. This was what the first respondent said in cross-examination:

S: Berapa lama kamu kenal Ahzahar sebelum 6 Mac 1985?

J: Saya kenal Ahzahar daripada tahun 1982 hingga 1985.

S: Adakah pernah tangkap Ahzahar dalam masa ini?

J: Tidak pernah.

b

S: Setuju kamu kenal Ahzahar sebagai orang tempatan sahaja?

J: Saya tahu Ahzahar masuk dalam Sekolah Henry Gurney.

S: Ada lihat Ahzahar pecah rumah?

J: Tidak.

c

S: Ada pernah tangkap Ahzahar curi motosikal? J: Tidak pernah.

S: Ada pernah tangkap atau lihat Ahzahar mencuri?

J: Tidak.

S: Macam mana tahu Ahzahar daripada Henry Gurney?

J: Saya dengar orang cakap.

d

S: Ada lihat rekod di mana-mana?

J: Tidak.

S: Kamu kata kamu tanya tentang kehilangan motosikal. Apa nombor report?

J: Saya lupa nombor report. Tetapi adalah tentang motosikal PAK 8973.

Secondly, on the question whether or not SP8 and SP7 were under arrest, the first respondent could not give consistent answers. At first he said (in cross-examination) that they were under arrest:

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S: Pada 6 Mac 1985 kamu tangkap SP7 dan SP8?

J: Ya.

However, subsequently, the first respondent said:

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Betul saya bawa Ahzahar dan OKT2 bawa Zakaria ke Balai. Saya bawa Ahzahar ke Balai untuk menyoalsiasatnya.

S: Ada awak tangkap Ahzahar?

J: Tidak tangkap hanya untuk soalsiasat.

And at a later part of the cross-examination he said:

S: Awak paksa Ahzahar dan Zakaria ke Balai? J: Tidak.

g

S: Kalau tidak paksa kenapa bawa ke balai?

J: Tempat itu tidak sesuai untuk mendapat maklumat.

S: Dalam keterangan kamu kata kamu suruh OKT2 untuk jaga Ahzahar supaya jangan lari? J: Betul.

h

S: Ini bermakna kamu tangkap Ahzahar. Jika tidak tangkap mengapa suruh OKT2 tengok Ahzahar supaya jangan lari?

J: Tujuan saya untuk perhatikan.

Thirdly, the first respondent alleged that he was framed by SP8. But in cross-examination, when asked as to the reason why the latter would want to do such a thing to him, he was not able to give a credible answer. In evidence he was able to say only the following:

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S: Kalau Ahzahar katakan awak minta [duit] apa kamu nak kata?

J: Saya tidak boleh halang apa dia kata. Itu hak dia.

S: Apa sebab Ahzahar kata demikian? **a**

J: Sebab dia nak menjatuhkan saya dan membuat tomanan.

S: Sebab apa Ahzahar nak jatuhkan [awak]?

J: Sebab Ahzahar takut apa yang dia lakukan terbongkar.

S: Apa yang dilakukan oleh Ahzahar?

J: Saya suspek Ahzahar banyak lakukan jenayah. **b**

Fourthly, the first respondent was evasive when asked (during cross-examination) as to the length of time he was in the coffee shop with Ahzahar. The evasiveness is evident from the following evidence:

S: Berapa lama dalam kedai kopi?

J: Tidak pasti?

S: Kamu kata masa terhad sebab hendak bertugas semula pada jam 6 petang? **c**

J: Ya.

S: Apa yang dibagi tahu oleh Ahzahar?

J: Tidak apa-apa kecuali Hamid takut saya apa-apakan dia.

S: Ada lain cerita?

J: Persekitaran itu sahaja. **d**

S: Berapa lama percakapan ini?

J: Saya tidak boleh pasti.

S: Ada minum teh?

J: Teh Ais.

S: Ahzahar minum apa?

J: Terlupa. **e**

S: [Cadang] Kamu ada dalam kedai kopi lebih kurang 30 minit?

J: Jidak pasti.

S: Jika tidak pasti berapa minit - lebih kurang berapa?

J: Tidak pasti. **f**

It was difficult to believe that the first respondent, being a policeman, could not tell the Court roughly how long he was in the coffeeshop with SP8. Yet, earlier on, when asked as to the length of time he was at the police station (on 6 March 1985) for the purpose of "interrogating" SP8, he was able to give an estimation as to time without any difficulty.

Fifthly, there was no official record of the arrest and interrogation. The answers given for the absence of any record were again far from satisfactory. On this issue this was what the first respondent said during cross-examination: **g**

S: Ada catat dalam station dairy balai membawa Ahzahar dan Zakaria ke Balai?

J: Saya tidak catat.

S: Kenapa tidak catat?

J: Sebab bagi saya tidak mustahak untuk catat.

S: Adakah urusan rasmi bawa Ahzahar ke Balai? **h**

J: Tugas tidak rasmi.

S: Kenapa kata tahan Ahzahar tugas bukan rasmi?

J: Sebab tugas jaga aman tidak terganggu.

S: Kamu bertugas dibekalkan dengan poket diary?

J: Betul. **i**

- a** S: Adakah buat catatan bawa balik Ahzahar dan Zakaria?
J: Tidak ada.
- S: Kenapa tidak catit dalam poketbook kamu? J. Sebab saya catit dalamnya benda yang mustahak sahaja.

- b** Sixthly, the first repondent's evidence during examination-in-chief that the money was thrust into his hand while SP8 shook his hand, that when he let go SP8's hand the money dropped on to the floor, and that he picked up the money to hand it back to SP8, contradicted the evidence of ACA Officer Encik Zainal b. Hj. Adam (SP11) who testified as follows:

Saya tidak dengar perbualan aduan [SP8] dengan OKT (1) [first respondent]. Jam 4:45 petang saya lihat aduan menyeluk saku belakang dengan tangan kirinya dan mengeluarkan sesuatu iaitu duit not RM10 iaitu warna merah. Saya lihat OKT (1) ambil not-not ini dengan tangan kanannya. Saya lihat dengan jelas. Selepas itu saya dapati SP8 bangun menuju ke kaunter bayaran untuk bayar harga minuman.

- c** In cross-examination, SP11 even said that he saw the first respondent counting the money. I see no reason why SP11 should lie to Court. There was no evidence that he had an axe to grind against SP8.

- d** Now, coming to the evidence of the second respondedent, here too I fail to see how on the evidence the learned Magistrate could come to the conclusion that the second respondent had raised a reasonable doubt. He gave evidence that on 6 March 1985, he and the first respondent went out on the first respondent's motorcycle to carry out peacekeeping duty at a football match. According to him, on the way the first respondent stopped SP7 and SP8 who were riding on a motorcycle. He said that a conversation took place between the first respondent and SP8 and that he heard the first respondent ask SP8 regarding the theft of a motorcycle. He added that after five minutes the first respondent told him that he wanted to bring SP8 to the police station, and that at the police station the first respondent took SP8 to the information room ("bilik penerangan"), while
- e** the second respondent remained at the inquiry counter, and both of them were in the room for about thirty minutes. The second respondent gave evidence that after the first respondent came out of the room the latter asked him to enter the room. According to him he was in the room for only five minutes. In the room he did not speak anything to SP8. The second respondent denied having told SP8 in the room that the matter could be settled upon payment of money.

- f** The second respondent further gave evidence that on the night of his arrest (but before the arrest) he went to the house of an 'informer' by the name of Sirajuddin accompanied by another constable by the name of Ariffin. At Sirajudin's house he met SP8 and a conversation took place between him and SP8 regarding the report that he had lodged against the first respondent.

- g** Having scrutinised the evidence of the second response particularly his answers to the questions put to him by the prosecuting officer, I hold that, although the learned Magistrate was right in holding that the presumption under s. 14 was not applicable to the second respondent, nevertheless the findings of the learned Magistrate that the evidence of the second respondent had succeeded in raising a reasonable doubt were clearly against the weight of evidence. I so rule for the following reasons.

- h** First, the second respondent, in his evidence, did not at all give any reason why SP8 would want to implicate him. Unlike the first respondent, the second respondent did not allege any animosity between himself and SP8. There was no evidence that SP8 had an axe to grind against him.

- i** Secondly, the following evidence of the second respondent during examination-in-chief and cross-examination reveals the weakness of his defence:

(a) In examination-in-chief he said:

Saya dan Arifin dipelawa untuk masuk ke rumah Sirajuddin. Di situ saya dapati SP8 ada di situ. Saya tanya SP8 adakah buat report tentang apa berlaku dengan OKT (1). SP8 jawab, "Ya." Dalam perbualan saya dengan [SP8], Arriffin tanya pada SP8 adakah apa yang berlaku dengan OKT (1)

melibatkan orang lain. SP8 jawab, 'Perkara yang berlaku dengan OKT(1) tidak ada sangkut paut dengan abang Kamal.

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(b) In cross-examination, he said:

S: Pada malam OKT(1) (16 Mac 1985) ditangkap kamu bertugas di mana?

J: Pada pagi itu saya bertugas di Mahkamah Rendah Alor Setar.

S: Pada malam itu kamu ke mana?

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J: Saya dengan Ariffin pergi ke Kg. Baru.

S: Siapa punya motosikal dinaiki?

J: Tidak ingat.

S: Di rumah Sirajuddin jumpa SP8?

J: Ada.

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S: Ariffin juga ada?

J: Ya.

S: Kamu kata pada SP8, "Sampai hati kamu buat begini kepada saya".

J: Ya.

S: Kamu yang marah pada SP8 dan bukan sebaliknya?

d

J: Saya tidak marah.

S: Jika tidak marah kenapa kata begitu?

J: Apa yang SP8 buat akan menyebabkan saya disoalsiasat nanti.

It would appear from the above evidence that at the time of the meeting between the second respondent and SP8 at Sirajuddin's house on the night in question the news of the ACA report lodged by SP8 and the arrest of the first respondent had already reached the second respondent's ear. Now, if the second respondent was really innocent, why was it that in the conversation between him and SP8 at Sirajuddin's house that night he was so concerned as to whether or not "other people" were implicated; and why did he appear to be melancholy (or upset)? What made him to believe that he would be interrogated? After all, according to him, SP8 had told him that he was not implicated. If he is innocent - and being a policeman - why was he afraid of being interrogated? The second respondent's reaction and inquisitiveness that night was consistent with that of a person pricked with a guilty conscience.

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Thirdly, like the first respondent, the second respondent also did not record the arrest (or detention) of SP8 and SP7 in his pocket book. Nor did he inform the inquiry office (of the police station) of the arrest of SP8 and SP7. Just like the case of the first respondent, there was no satisfactory explanation for such an omission.

Finally, but remarkably, he failed to provide an answer to a very simple but pertinent question put to him by the prosecuting officer during cross-examination:

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S: Kenapa kamu tahan pula SP8 dan Zakaria dan tidak pergi jaga aman?

J: Sebab perkara ini telah berlaku.

In conclusion, it is my view that upon a careful examination of the whole evidence adduced by the defence, it is clear that, contrary to the findings of the learned Magistrate, the first respondent had failed to rebut on a balance of probability the presumption under s. 14 of the Act; and that the second respondent had failed to raise a reasonable doubt.

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Accordingly, I allow the appeal and reverse the decision of the learned Magistrate. I find the respondents guilty and I convict them of the charges.

After the plea of mitigation by the defence Counsel on the respondents' behalf, each of the respondents was sentenced to imprisonment for a term of four months. In addition the first respondent was ordered to pay a penalty of RM 30.

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